IN THE
INDIANA SUPREME COURT

No. _____

(Court of Appeals No. 49A02-0007-CV-433)

MEGHAN RENE, *et al.*,	)	
	)	APPEAL FROM THE MARION
Appellants (Plaintiffs Below),	)	SUPERIOR COURT, ROOM NO. 12
	)	
v.	)	Cause No. 49D12-9805-CP-370
	)	
DR. SUELLEN REED, *et al.*,	)	HONORABLE SUSAN MACEY
	)	THOMPSON, JUDGE
Appellee (Defendant Below).	)	

PETITION TO TRANSFER

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Questions Presented on Transfer

1. Were the due process rights of disabled students who were forced to take and pass the graduation qualifying examination (hereinafter "GQE") violated where, even though they received remediation opportunities after they first flunked the test as sophomores, the evidence is undisputed that disabled students were not necessarily taught the building block material necessary to learn what was tested and the evidence is undisputed that even after the GQE requirement went into effect, almost 50% of all learning disabled students still did not have their curriculum realigned to teach what was tested on the examination?

2. Does due process require that the case conferences which generally control the education received by disabled students be given the authority to determine if disabled students should graduate without considering the GQE until such time as the graduation qualifying examination is a fair test of what the disabled students have actually been taught given that it is uncontested that many disabled students did not have adequate curriculum preparation prior to being forced to take the GQE, and given that it is uncontested that it takes learning disabled students more time to learn material?

3. Does the Individuals with Disabilities Education Act (hereinafter "IDEA"), 20 U.S.C. § 1401, *et seq.*, require that disabled students who are prescribed various testing modifications and accommodations by their case conferences be permitted these modifications and accommodations during the GQE?

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PETITION TO TRANSFER

Background and Prior Treatment of Issues on Transfer

Beginning with the class of 2000, in order to receive a diploma, all Indiana public high school students were required to take the GQE and pass it subject to certain waivers. IND. CODE § 20-10.1-16-1.5; IND. CODE § 20-10.1-4.3. Special education students who have been found disabled pursuant to the IDEA are also subject to the GQE requirement. (Slip opinion at 3).

The disabled children in this case filed their class action complaint seeking injunctive and declaratory relief on May 21, 1998 (R. 14). Pursuant to a prior decision of the Court of Appeals, *Rene v. Reed,* 726 N.E.2d 808 (Ind.Ct.App. 2000), the case was eventually certified as a class action with two classes defined as:

Class A:

> All children with disabilities (as defined in *Ind. Code* 20-1-6-1) who have been, are being, or will be required to pass the Indiana Statewide Testing for Education Progress (ISTEP+)[1] test as a condition of receiving a High School Diploma and who, prior to the advent of the ISTEP+ examination were designated as being in the diploma track, but who had, in the past, been excused from standardized testings, and/or whose individualized education plans did not provide that they were to be taught the subjects tested on the ISTEP+ examination.

Class B:

> All children with disabilities (as defined in *Ind. Code* 20-1-6-1) who have been, are being, or will be required to pass the Indiana Statewide Testing for Education Progress (ISTEP+) test as a condition of receiving a High School Diploma and who have, or at the time of taking the ISTEP+ graduation exam had or will have, individualized education plans which exempted them or which will

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[1]The test is more properly known as the GQE (graduation qualifying examination) and will be referred to in this Brief as the GQE. *See, Rene v. Reed*, 726 N.E.2d 808, 813, n. 3 (Ind.Ct.App. 2000).

> exempt them from standardized testing or which allow or which will allow for adaptations and accommodations during testing which are not or will not be honored during the testing.

(R. 1362).

On behalf of the first class the disabled children claimed that due process required both that they be given adequate notice before the GQE requirement went into effect and that they be given adequate exposure to both the material tested on the examination and an opportunity to learn the material. In finding that no due process violation was present, the trial court noted that given that once the test, first given in the sophomore year, is flunked, students have remediation opportunities, it was "implausible that the Plaintiff class was not exposed throughout their high school career to the subjects tested on the GQE." (R. 1375). The trial court did not address the substantial difference in preparation given to non-disabled students compared to that given to disabled students. Indiana law and practice required that the curricula for all non-disabled students be realigned beginning in kindergarten for the class of 2000 in order to teach the building blocks necessary to learn the material tested on the GQE. (Court of Appeals brief of appellants at 6-10; Slip opinion at 11).[2] Yet, it was not until 1997, shortly before the GQE test was first given, that parents and disabled children learned that the GQE test and the proficiencies it tested had to be satisfied for disabled students as well. (Court of Appeals brief of appellants at 10-13). The trial court also did not comment on the uncontested evidence that prior to the GQE, and therefore prior to the giving of remediation, many

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[2] As is indicated in the disabled students' Court of Appeals brief at pages 6-13, Indiana added the ISTEP program, without the GQE requirement, in 1987. Pursuant to that 1987 law, the State Board of Education was to begin adopting educational proficiencies and achievement standards for grades 1-8. However, disabled students were expressly exempted from these general proficiency standards. When the statute was amended in 1990 to apply to high school students, disabled students were again exempted. Therefore, the curriculum of non-disabled students has been adjusted and aligned to the materials tested on the ISTEP exams, and later the GQE exam, since 1987. Disabled students found out about the requirement in 1997.

disabled students had not been exposed to the basic building block material necessary to learn what was tested on the GQE and that, further, even after the GQE requirement went into effect, approximately 49% of special education directors indicated that learning disabled students had not had adequate curriculum preparation to pass the GQE. (Court of Appeals brief of appellants at 13-17).[3] The trial court also found that even if there had been due process violations, the only remedy due the disabled children was more remediation opportunity, even after the students' class had graduated. (R. 1381).

As far as Class B was concerned, the trial court found that the IDEA was not violated, despite the fact that certain modifications and accommodations established by case conferences and mandated in disabled students' individualized education plans (IEPs) could not be used during the GQE. (R. 1381-82).[4] Chief among the modifications or accommodations which are not honored

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[3] In July of 1999 the Indiana Legislative Services Agency issued a report entitled *The Impact of the ISTEP+ Graduation Qualifying Exam on Students with Learning Disabilities*. (R. 870). It noted that:

> In addition to the lawsuit [*Rene v. Reed*], a survey of directors of special education planning districts suggests that other students with learning disabilities may not have been adequately prepared to take the GQE. Based on a survey of directors of special education planning districts (conducted by the Legislative Services Agency in May of 1999), the directors estimated that approximately 51% of the 10th and 11th grade students with learning disabilities who took the GQE had sufficient curriculum preparation. These results indicate that other students with learning disabilities may be in situations similar to those students who filed the complaint.

(R. 911). This is similar to the conclusions reached in a study of the GQE done by Dr. Genevieve Manset, Ph.D. of Indiana University and Sandra Washburn entitled "Project Exit". (R. 150, 153, 164).

[4] The IEP sets out the blue print of the disabled child's education and must also include testing modifications. 20 U.S.C. § 1414(d). (*See also* Court of Appeals brief of appellants at 4-6).

is the IEP requirement that tests be read to students. (Court of Appeals brief of appellants at 18). Even if the IEP so indicates, the reading comprehension portion of the GQE cannot be read to the student. (*Id.*). Additionally, the following testing accommodations or modifications agreed upon by case conferences and placed into the IEPs are not honored during the GQE:

> -not honoring an IEP which requires that multiple choice tests not contain more than three questions
>
> -not honoring an IEP which requires that a student be provided with color coded prompts
>
> -not honoring an IEP which provides that the language of mathematical story problems be reduced
>
> -not honoring an IEP which provides that a diploma can be awarded without taking the GQE

(*Id.*).

On appeal, in a published decision issued on June 20, 2001, the Court of Appeals affirmed the trial court in all respects. Like the trial court, the Court of Appeals concluded that students had an interest, protected by due process, in the award of a diploma if all the graduation requirements were met. (Slip opinion at 5 -7). The Court of Appeals noted that due process would be violated both if students did not have sufficient notice of the GQE and/or if the examination covered material to which the students had not been exposed. (*Id.* at 7). However, the Court of Appeals found that there was sufficient evidence to support the trial court's determination that the three years notice provided to students and parents was adequate for due process purposes. (*Id.* at 9). The Court of Appeals also concluded that the trial court's finding that disabled students had remediation opportunities beginning in their sophomore years was adequate to support a conclusion that the students had adequate exposure to the information tested on the GQE. (*Id.* at 11-13). The Court of Appeals further noted that the trial court committed no error in concluding that the remediation

offered by the State was an adequate remedy in the event that the GQE requirement did, in fact, violate due process. (*Id.* at 14).

Finally, the Court of Appeals concluded, as did the trial court, that the IDEA was not violated to the extent that the State refused to allow students to use adaptations and modifications on the GQE dictated by their case conferences and IEPs if the State deems the adaptations and modifications to be for " 'cognitive disabilities' that can significantly affect the meaning and interpretation of the test score.'" (*Id.* at 17).

Reasons to Grant Transfer

The Court of Appeals erroneously decided a new and important question of law and has erroneously determined a case of great public importance that should be decided by this Court

I. Introduction

As a result of the Court of Appeals decision more than a thousand students who had been in a position to obtain a high school diploma prior to the advent of the GQE will not receive their diplomas.[5] Their lives have been forever changed, to their detriment. This is undoubtedly a matter of great public import. Moreover, the decision of the Court of Appeals erroneously diminishes the due process rights that all students have in insuring that graduation requirements are not altered in a manner that makes it impossible for them to achieve graduation. It also erroneously, in the first reported judicial decision of its kind in the United States, allows modifications and adaptations prescribed in IEPs to be dispensed with during state wide assessments and in doing so violates the IDEA. Accordingly, transfer should be granted.

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[5] In the class of 2000 alone, approximately 1,162 disabled children who were on the diploma track did not pass the GQE and were not eligible for waivers and therefore did not graduate. (R. 336).

II. The Court of Appeals decision that the disabled students' due process rights were not violated is erroneous since the evidence was uncontested that many of the students were not taught curriculum that was aligned to teach the proficiencies tested on the examination and the remediation opportunities afforded after the testing began were not enough to remedy the lack of alignment through the students' educational lives

The Court of Appeals properly recognized that due process is violated if students are given insufficient notice of a graduation examination requirement and if the students, although provided with adequate notice, are not taught the information tested on the examination. (Slip op. at 7). *See also, Brookhart v. Illinois State Board of Education*, 697 F.2d 179 (7th Cir. 1983); *Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981); *Crump v. Gilmer Independent School* District, 797 F.Supp. 552 (E.D.Tex. 1992); *Anderson v. Banks*, 520 F.Supp. 472 (S.D.Ga. 1981), *app. dmd.*, 730 F.2d 644 (11th Cir. 1984). Therefore, the mere fact that the disabled students and their parents were given three years notice, in 1997, that the class of 2000 would have to satisfy the GQE requirement does not resolve the question of whether the GQE satisfied due process. If the General Assembly passed a law in April of 2000 requiring all students to demonstrate a proficiency in Spanish and made it effective with the class graduating in May of 2004, it would be difficult to argue that notice was inadequate, provided that evidence demonstrated that proficiencies could be taught in this four year period. However, if students were never taught the language, this would violate substantive due process since, regardless of how long the requirement was in effect, there is no way that anyone could learn the language and demonstrate proficiency. "When it encroaches upon concepts of justice lying at the basis of our civil and political institutions, the state is obligated to avoid action which is arbitrary and capricious, does not achieve or even frustrates a legitimate state interest, or is fundamentally unfair." *Debra P.*, 644 F.2d at 404.

In finding that there was no substantive due process violation the Court of Appeals relied only on the trial court's factual finding 7 that because a student was afforded remediation

opportunities once he or she flunked the GQE, it was "implausible" that the disabled students were not exposed to the subjects tested on the GQE. (R. 1375). However, both the Court of Appeals and the trial court ignored uncontested evidence which demonstrates that the disabled students simply did not have exposure to the information tested on the GQE in a manner that would provide them a reasonable opportunity to learn the material.

The Court of Appeals recognized that at no time prior to the GQE was any requirement imposed on schools that they align the curricula of disabled students, even those on a diploma track, to a particular criteria. (Slip opinion at 11, *see also,* Court of Appeals brief of appellants at 6-13). But Indiana law specifically provided that non-disabled students had to have their curriculum aligned throughout their education lives from the time they began elementary school, thus assuring exposure to the building blocks which would lead to mastery of the information tested on the GQE. (*Id.*). Inexplicably, the Court of Appeals fails to mention that even after the GQE went into effect, 49% of the special education directors in Indiana believed that learning disabled students had not had sufficient curriculum preparation to pass the GQE. (R. 911).

Education is a process of layering concepts, of placing building block material learned in elementary school on top of new material to achieve mastery of complex high school material. (R. 153). This process takes time and if the curriculum was not aligned to teach the pre-high school concepts in elementary school, the building blocks will not be present in high school so the student can learn the more difficult concepts tested on the GQE. (*Id.*). The educational realignment process therefore takes time and must begin with the lowest grade levels. (R. 106, 153, 212). This is especially true for learning disabled students who learn at a slower pace than their non learning disabled peers. (*Id.*)

None of this is disputed. Although it is true that students who flunked the GQE had

remediation opportunities in their sophomore, junior and senior years, for many disabled students this remediation was provided without the student having adequate curriculum preparation. Providing remediation in this situation is no more "exposure" to the subjects tested on the GQE than claiming that a 4th grader is "exposed" to algebra when she is forced to attend a class without ever having been taught any pre-algebra concepts.

Substantive due process is offended by irrational and unreasonable conduct by the State. *See e.g., Mitchell v. State*, 659 N.E.2d 112, 115-16 (Ind. 1995). Non-disabled students in Indiana were given 12 years to prepare for the GQE. Disabled students in the class of 2000 were given three years. Even after the GQE went into effect, almost one-half of all learning disabled students still had not had their curriculum aligned to the test. This is irrational and arbitrary. Moreover, this due process violation is not mitigated by the fact that at the end of their education careers the disabled students were offered remediation. The evidence is uncontested that this is not a substitute for being taught the information by laying the proper foundation and building on it throughout students' entire educational careers. The Court of Appeals decision erroneously fails to recognize the due process violation.

III. The opportunity for remediation is not an effective remedy for the due process violation

The Court of Appeals held that even if there was a due process violation, it was remedied by the fact that disabled students could be given additional remediation, at least through the age of 21. (Slip opinion at 13- 14, 511 IAC 7-3-49). However, use of the algebra example above quickly demonstrates why additional remediation is not the appropriate remedy. In a situation where the court is faced with a systematic failure of substantive due process, where a large number of students were not taught what was tested, the appropriate remedy is to enjoin the state from requiring the

graduation examination until such time as it is no longer irrational to impose the requirement on the class. Thus, in *Anderson* the court concluded that, since the graduation test policy:

> violates due process, all plaintiffs . . . prevail. Defendants are ordered to award diplomas to all students who would have received them except for the existence of the [graduation test] policy. No exit exam policy may be utilized until it is demonstrated that the test used is a fair test of what is taught.

520 F.Supp. at 512. And, in *Debra P.* the court held "that the State may not deprive its high school seniors of the economic and educational benefits of a high school diploma until it has demonstrated that the (graduation test) . . .is a fair test of that which is taught in the classrooms." 644 F.2d at 408.

The proper remedy in this case is to enjoin the State from enforcing the GQE requirement until such time as it is a fair test of what disabled children have been taught. The case conferences should be entrusted with the responsibility to determine if it is appropriate for a student to take the GQE in order to graduate. If the case conference determines that the student has been adequately exposed to the information throughout his or her educational career the GQE requirement can be used. If not, then the student should be allowed to graduate if he or she meets all other requirements aside from the GQE.

IV. The Court of Appeals erred in holding, in the first reported court decision in the United States on the subject, that the failure of the State to honor certain IEP mandated modifications and adaptations during the GQE did not violate the IDEA

It is undisputed that IEP mandated testing modifications and adaptations which students can use on every test they take in elementary, middle, and high school are not allowed by the State during the GQE, the most important test the students will ever take in public school. The Court of Appeals found that the IDEA is not offended by banning testing accommodations for cognitive disabilities. As the Court of Appeals recognizes, this is apparently the first reported decision in the United States on this point (slip opinion at 17). The Court of Appeals erred in reaching its decision.

It is clear that courts "must pay great deference to the educators who develop the IEP." *Todd D. by Robert D. v. Andrews*, 933 F.2d 1576, 1581 (11th Cir. 1991). It is also clear that the IEP is to specifically indicate "any appropriate accommodations, when necessary" in state wide assessments that a disabled child will take. 20 U.S.C. § 1412(a)(17).[6] Yet, the State is mandating that the IEP, which is, of course, a creature of federal law, be ignored when the GQE is given. It is clear that state educational standards cannot override the mandate created by the IDEA. *See e.g, Florence County School District Four v. Carter*, 510 U.S. 7 (1993).

The IDEA requires that education be "provided in conformity with the individualized education program" as well as meeting the standards of the State educational agency. 20 U.S.C. § 1401(8). The question, of course, is whether the standards of the State can overrule the IEP. The problem here is that the standard the State has adopted runs directly counter to the explicit language of the IDEA which allows modifications to be used in state wide assessments and it runs counter to the notion that the IEP should structure the child's educational experience. In the battle between State law and policy and federal law, federal law must be the winner. U.S. CONST. ART. VI. The Court of Appeals therefore erred in finding that the policy prohibiting certain accommodations and modifications on the GQE does not violate federal law.

Conclusion

It is an unpleasant reality that when educational standards are set, some persons cannot achieve the standards. However, it is not only unconstitutional, but tragic, when the bar is raised without giving students sufficient preparation to make it possible for them to achieve the standard. That is the situation here. As the result of the Court of Appeals decision, students who were on the

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[6] Federal law also allows disabled children to be exempted from state wide assessments if the child's case conference so determines. 20 U.S.C. § 1412(a)(17); 20 U.S.C. § 1414(d)(1)(A).

verge of graduation, who would have graduated but for the GQE, have not. Without diplomas their lives have been radically altered. This Court should grant Transfer and remedy the due process and statutory violations. Judgment should be issued for the plaintiff classes.

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WORD COUNT CERTIFICATE

I verify that this petition contains no more than 4,200 words in accordance with Appellate Rule 44.E.

Kenneth J. Falk

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the following person(s) on this 19 day of July, 2001, by first class U.S. Postage, pre-paid.

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